

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 15, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: December 18, 2006

Case Number: TSO-0457

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ A local DOE Security Office (LSO) suspended the individual's access authorization pursuant to the provisions of Part 710. In this Decision I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be restored. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be restored.

I. Background

The individual has held a DOE security clearance for many years. During a routine background reinvestigation, the LSO learned that the individual had not filed his Federal and State income tax returns for a four-year period, 2000 through 2003. During a subsequent Personnel Security Interview (PSI) with the individual in March 2006, the LSO learned that the individual had not filed his Federal and State income taxes for two additional years, 2004 and 2005, and had experienced some financial difficulties that led to his having two delinquent accounts and one outstanding collection account. The individual told the LSO during the March 2006 PSI that he would file his taxes within a few weeks. When the LSO contacted the individual four months later, it learned that the individual had not filed his taxes.

In December 2006, the LSO initiated formal administrative review proceedings when it informed the individual that his access authorization had been suspended pending the resolution of certain derogatory information that created substantial doubt regarding his continued eligibility to hold a security clearance. In a Notification Letter that it sent to the individual, the LSO described this derogatory information and explained how that

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

information fell within the purview of one potentially disqualifying criterion, Criterion L, that is set forth at 10 C.F.R. § 710.8(l).²

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations and requested an administrative review hearing. On December 19, 2006, the Director of the Office of Hearings and Appeals (OHA) appointed Janet Freimuth the Hearing Officer in this case; I was appointed the substitute Hearing Officer on January 9, 2007. Subsequently, I convened a hearing in the case.

At the hearing, three witnesses testified. The LSO presented no witnesses. The individual presented his own testimony and that of two other witnesses. The LSO submitted 10 exhibits into the record; the individual tendered two exhibits. I closed the record in this case on April 13, 2007 when I received a post-hearing submission from the individual.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

² Criterion L relates, in relevant part, to information that a person has “engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or undue duress which may cause the individual to act contrary to the best interests of national security . . .” 10 C.F.R. § 710.8(l). Such conduct or circumstances for purposes of Criterion L include, but are not limited to, a pattern of financial irresponsibility.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. Findings of Fact

There is conflicting information in the record about the length of time that the individual neglected to file his Federal and State income tax returns and whether the individual's wages were garnished to satisfy some of his tax liabilities once or twice.

The LSO first became aware of the individual's failure to file his income taxes during a routine background investigation that was conducted sometime in 2004. Exhibit (Ex.) 4. At that time, the individual revealed that he had not filed his Federal and State taxes for the tax years 2000 to 2003. *Id.* Upon learning this information, the LSO sent the individual a Letter of Interrogatory (LOI) and inquired about the individual's tax filing delinquencies and financial stability. Ex. 5. The individual responded to the LOI on November 30, 2005. *Id.* In his response, the individual stated that he had paid his State and Federal taxes for the year 2000, but had not yet filed his taxes for the years 2001-2004. *Id.* Regarding his payment of the 2000 Federal taxes, the individual related that the Internal Revenue Service had garnished his wages in July and August 2005 to satisfy his Federal tax liabilities in 2000. *Id.* The individual further stated that he had not taken any action as of November 2005 to resolve the tax delinquencies because he had misplaced some of the documents that he needed to complete the tax forms. *Id.* He also revealed in the LOI that he had overextended himself with credit card debt and had two outstanding collection accounts. *Id.*

The LSO next conducted a PSI with the individual in March 2006 to inquire further about the individual's financial situation and his tax delinquencies. Ex. 3. The individual told the LSO during the PSI that he still had not filed his 2001 through 2004 Federal and State income taxes and also had not filed his 2005 Federal and State taxes as of that date. Ex. 3. The LSO advised the individual at the conclusion of the PSI that it considered his actions to constitute tax evasion and that it was concerned that he was violating the tax laws. *Id.* at 29. In response, the individual told the LSO that he intended to file his back tax forms. *Id.* at 29 Four months later, the LSO contacted the individual to determine if he had filed his Federal and State income taxes for the years 2001-2005. Ex. 7. The individual informed the LSO that he had not yet filed his taxes for the years in question. Accordingly, the LSO suspended the individual's security clearance in December 2006.

At the hearing, the individual testified that he last filed his Federal and State income taxes in 1996. Transcript of Hearing (Tr.) at 21. He also testified that his wages were garnished in 2000 to satisfy his tax liabilities for the years "1996 to 2000." *Id.*

Regarding his other financial affairs, the individual's February 2006 Credit Report revealed two past due accounts and one outstanding account. Ex. 1. A Credit Report dated April 2, 2007 reflects two past due accounts, two collection accounts, one "account charged off," and a notation that the individual's mortgage lender had initiated foreclosure proceedings five times (June 2006, May 2006, May 2004, April 2004 and March 2004). Ex. A.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).³ After due deliberation, I have determined that the individual's access authorization should not be restored at this time. I cannot find that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Derogatory Information and Associated Security Concerns

As previously noted, the LSO cites one potentially disqualifying criterion as the basis for suspending the individual's security clearance, *i.e.*, Criterion L. The conduct underlying the Criterion L concerns is the individual's failure to file annual Federal and State income tax returns as required by the law and his inability or unwillingness to satisfy his debts. The security concerns associated with this conduct are the following. First, the individual's failure to fulfill his filing requirements under the relevant tax laws raises questions about his reliability, trustworthiness and ability to protect classified information. Second, the individual's failure to meet his financial obligations in a timely basis may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all which also call into question the individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline F of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House.

³ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

B. Mitigating Evidence

1. The Individual's Testimony

At the hearing, the individual offered several explanations for his failure to file his Federal and State income taxes. He first testified that he has had difficulty since 1997 obtaining interest statements from his mortgagors. Tr. at 10. He also related that his lack of organization skills has resulted in his not being able to locate the documents that he needs to complete his tax returns. In this regard, he stated that he has “documents stuck here and there in different piles of stuff.” *Id.* at 11. Third, he suggested that depression might account for his procrastination and inability to fulfill his filing responsibilities. With regard to this matter, he testified that he stopped filing his tax returns in 1996 because he became very depressed after breaking up with his girlfriend. *Id.* at 21. He sought psychiatric care for the depression in the mid-1990s but is not currently on medication for depression or under a doctor's care for that mental condition. *Id.* at 22. He admitted at the hearing that his “depression comes and goes,” however. *Id.* at 22. He revealed at the hearing that he is currently under the care of a psychologist. *Id.* at 14. His manager and supervisor referred him to the psychologist at the Employee Assistance Program after his co-workers reported that he was yelling and cursing at a computer in the workplace. *Id.* at 15, 58. According to the individual, he began seeing the psychologist in March 2007 and expects to continue that relationship indefinitely on a monthly basis. *Id.* at 16. He testified that he has not discussed with his psychologist his proclivity to procrastinate in general, or his failure to file tax returns in particular. *Id.* at 42.

With respect to his delinquent accounts, the individual maintained at the hearing that he had “paid off everything.” *Id.* at 41. In fact, he offered to provide a “tracking number” for a \$735 debt that he claimed to have recently paid. *Id.* at 34. He did not, however, produce any evidence such as a check or statement from the creditor to prove that he had paid the debt in question. Moreover, a Credit Report dated April 2, 2007 still shows the delinquent account with an outstanding balance of \$735.

Finally, the individual testified that he is a reliable employee and very security conscious. *Id.* at 40, 44. He admitted, however, that he has not taken his own finances as seriously as he has his job responsibilities. *Id.* at 47. He concluded by stating that he intends “to get things taken care of.” *Id.* at 80.

2. Two Supervisors' Testimony and One Supervisor's Witness Statement

The individual's former supervisor and current second-tier supervisor testified at the hearing. The second-tier supervisor related that the individual is a “good hard worker” and a “satisfactory employee.” *Id.* at 55. According to the second-tier supervisor, the individual told him that he had some motivational challenges that inhibited his ability to attend to his tax issues. *Id.* at 57. The second-tier supervisor testified that he has not personally observed any negative performance issues with the individual but added that some of the individual's co-workers have reported that the individual lacks focus and motivation in the workplace. *Id.* at 58. The second-tier supervisor admitted that he was

involved in sending the individual to an EAP counselor because of the individual's attitude and approach to the job, which included a verbal outburst directed at a computer. *Id.* at 58. Despite these matters, the second-tier supervisor testified that he "absolutely trusts" the individual and opined that the individual understands his personal issues and will keep them separate from his professional life. *Id.* at 59.

The individual's former supervisor testified that the individual is conscientious in his work environment and very detail oriented. *Id.* at 72. He stated that the individual is an average performer who "does fine." *Id.* at 73.

The individual's current supervisor who was unavailable to testify at the hearing provided a written statement on the individual's behalf. Ex. B. In his statement, the current supervisor stated that after the individual explained why his security clearance was suspended, the current supervisor now sees a cross-over of the individual's behavioral traits from his home life to his work life. *Id.* For example, the current supervisor related that the individual "seems to be oblivious to deadlines and/or urgent matters where being proactive is required, even if it were to benefit him." *Id.* The current supervisor then related a specific incident that had occurred the week prior to the hearing that supported his opinion in this regard. *Id.* The current supervisor also stated that he and other managers had asked the individual to volunteer for the EAP program because of outbursts at work due to frustrations that he was having on the job. *Id.* He concluded by saying that the individual has many positive traits and that he does not perceive him to be a malcontent, or a physical threat to those around him. *Id.*

C. Hearing Officer Evaluation of Evidence

After carefully reviewing the documentary and testimonial evidence, I find that the individual has failed to present any probative evidence to mitigate the security concerns at issue in this case. By his most recent account, the individual has failed to file his Federal and State income taxes returns for eight years (1997-2005).⁴ The individual's intentional, delinquent filing of income tax returns over an extended period of time is a very serious matter and demonstrates the individual's total lack of regard for the law. Furthermore, the fact that the Internal Revenue Service (IRS) garnished the individual's wages on at least one occasion to satisfy his outstanding tax liabilities suggests that the individual is not promptly meeting his financial obligations. Other Hearing Officers in similar cases have held that "the lack of interest and effort, over a lengthy period, in dealing with taxes is incompatible with the standards required of those who hold an access authorization." *See Personnel Security Hearing*, Case No. VSO-0538, 28 DOE ¶ 82,876 at 86,089 (2002); *Personnel Security Hearing*, Case No. TSO-0378, <http://www.oha.doe.gov/cases/security/tso0378.pdf>. Moreover, the LSO warned him in March 2006 about the negative implications associated with his conduct, yet he not only failed to take any action to rectify his situation but he also reneged on his statement to the LSO that he would attend to the situation. In fact, despite knowing that his security clearance was in jeopardy, he came to the hearing without one piece of documentary evidence to show that he had taken any action to file his State and Federal income taxes

⁴ At the time of the hearing in early April 2007, the individual still had two weeks to file his 2006 income tax returns to meet his filing deadline.

for the period at issue in this case. The individual's inaction in this regard underscores his unreliability and untrustworthiness and raises questions about his judgment. Furthermore, the individual's long-term inability to rectify his tax situation and his failure to carry through on his past promises to complete and file his tax returns are reasons why I am not convinced by his hearing testimony that he will "get things taken care of."

With regard to the individual's assertion that he could not file his taxes over an eight-year period because he had difficulty obtaining his interest statements from his mortgagors, I find the excuse unconvincing. The individual clearly did not make filing his taxes a priority item, otherwise, he would have been more proactive in contacting his mortgagors or seeking professional assistance to address this situation.

As for the individual's lack of organization skills, I am similarly unimpressed. If the individual discerned that his disorganization was the cause of his inability to file his taxes, it is reasonable to expect that he should have taken steps to address this situation at some point over the last eight years.

With respect to the individual's argument that his depression might be at the root of his procrastination and inability to focus, I am unable to mitigate the issues before me without some expert testimony to corroborate the individual's assertions about the state of his mental health.⁵

Regarding the individual's delinquent accounts, he failed to provide any documentary evidence to confirm that he had paid his outstanding accounts. The only current evidence that he tendered was a Credit Report dated April 2, 2007, which shows outstanding balances on the very accounts that he claims to have paid.

Finally, I considered the cumulative testimony of the individual's current and former supervisors who all attested that he was a satisfactory employee. I accorded only neutral weight to the testimony as it is insufficient to overcome the security concerns associated with a long-term, serious pattern of ignoring State and Federal tax laws and resolving his financial delinquencies.

In the end, I find that the individual has not met his burden of mitigating the security concerns at issue in this case. Accordingly, I find that his security clearance should not be restored.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion L. After considering all the relevant information, favorable and unfavorable, in a comprehensive

⁵ The DOE did not invoke Criterion H in this case, which relates to mental conditions that could raise security concerns. In 2005, the DOE decided that the individual's psychiatric treatment during the mid-1990s was not a security concern because there was no indication that the individual had an emotional, mental or personality disorder at that time. Ex. 10 at 2. The DOE was apparently unaware of the individual's own report that his depression "comes and goes" (Tr. at 22) or that his supervisors referred him in March 2007 to the Employee Assistance Program for psychological counseling.

common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to mitigate all of the security concerns advanced by the LSO. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: May 15, 2007